

**STATE OF MAINE**  
**SPECIAL EDUCATION DUE PROCESS HEARING**

**April 19, 2007**

**07.047H--Parent v. Maine School Administration District #9**

**REPRESENTING THE FAMILY:           Richard O'Meara, Esq., Staci Converse, Esq.**

**REPRESENTING THE SCHOOL:       Eric Herlan, Esq.**

**HEARING OFFICER:                 Shari Broder, Esq.**

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This hearing was held and this decision issued pursuant to Title 20-A, MRSA, 7202 et. seq., and 20 U.S.C. §1415 et. seq., and accompanying regulations. The hearing was held on February 9, 26 and 28, 2007, and March 14 and 21, 2007. Two days of hearing were at the Skowhegan District Courthouse, two days were at the Maine School Administration District #9 ("District") offices, and the March 21 hearing was held in the offices of Murray, Plumb & Murray, Portland, Maine. In addition to counsel and the hearing officer listed above, those present for the proceeding were the mother, the grandmother, and Ed Ferreira, Director of Special Education for the District. Testifying at the hearing were:

The mother	
Sandra Wyman	Case Manager, Richardson Hollow
Amie Williams	Tutor
Grandfather	
Brian Foster	Assistant Director of Special Education
Darcy Wilber	Special Education Teacher
Nicole Goodspeed	Principal, Cascade Brook School
Darlene Paine	Principal, Academy Hill School
Kevin McShane	Special Education Teacher

All testimony was taken under oath.

**I. PROCEDURAL BACKGROUND:**

The mother requested this due process hearing on December 29, 2006. The case involves the student, whose date of birth is xx/xx/xxxx/. The prehearing conference was held on February 1, 2007. Participating were: the mother; Richard O'Meara, Esq., and Staci Converse, Esq., counsel to the mother and student; the student's grandparents; Eric Herlan, Esq., counsel to MSAD #9 ("District"); Edward Ferreira, Special Education Director; Brian Foster, Assistant Special Education Director; and Shari Broder, Hearing Officer. The student [sic] submitted approximately 714 pages of exhibits, and the District submitted approximately 448 pages of exhibits.

Because it was not possible to complete the hearing on February 9, 2007, the date set for hearing, the parties agreed to additional hearing dates listed above. Both parties requested and were granted leave to file written closing arguments, which were submitted on April 4, 2007, and the record closed at that time. The mother submitted a 62-page memorandum, and the District submitted a 49-page memorandum.

**II. ISSUES:**

1. Did the District fail to meet its IDEA child find or referral obligations from January 2005 to the present?
2. Did the District fail to provide the student with a free appropriate public education following his re-enrollment in public school, and prior to his eligibility identification, during the second half of the 2004-2005 school year or the first half of the 2005-2006 school year?
3. Did the District fail to provide the student with a free appropriate public education for the second half of the 2005-2006 school year and his extended school year program?
4. Was the IEP developed for the 2006-2007 school year reasonably calculated to provide FAPE to the student?
5. Is the student entitled to revision of the 2006-2007 IEP to include present level of performance statements based upon his most recent testing results, measurable goals and objectives, provision of private transportation services, and extended day or tutorial services?
6. If the hearing officer finds any violation of the above, what remedies are appropriate?

### **III. FINDINGS OF FACT**

1. The student is xx years old. He lives with his mother in New Sharon, Maine. The student's parents never married, but lived together until the student was xx years old. While the student's parents were living together, the student witnessed his father verbally abusing and denigrating his mother. [P-401, Testimony of mother] The mother's mother (henceforth "grandmother") and the mother's stepfather (henceforth "grandfather"), who live next door, are very involved in the student's care, including his education.
2. The student is identified as eligible for special education because he has a learning disability and behavioral needs.
3. The student began xx in the fall of 2000 at the Cape Cod Hill School in New Sharon. [Testimony of mother] He experienced problems with self-control and social skills, such as interrupting a lot, and bothering the other children. [Testimony of mother, S-319]
4. The student was in Ms. Ames's class for xx grade. Ms. Ames commented in his report card that the student was easily distracted, usually not on task, and refused to do his work. [P-449] Except for the subject of Art, the student reportedly needed improvement in the area of "effort." [P-449-451] The teacher wrote, "Behavior interferes often w/learning." [P-451]
5. In January 2002, the student began counseling with Karla Bock, LCSW. During her intake session, Ms. Bock noted that the student "often tells stories that are not true." [P-446] She also wrote that he is easily frustrated, gets angry easily and often, and the other children call him names. [P-446] He bullies the other children. [P-446] On January 21, the mother brought Ms. Bock a letter from Ms. Ames which said the student was not getting what he needed in school. [P-413] Ms. Ames asked the mother to meet with Nelia Farmer-Phal, the school psychologist, to discuss the student's needs. [P-413] They discussed how this could be valuable for the student, as Ms. Farmer-Phal could do testing and explore the student's

learning style and needs. [P-413] On January 28, 2002, the mother told Ms. Bock that she would not meet with Ms. Farmer-Phal because she was connected to the District. [P-413] Ms. Bock's notes report that the grandmother told her that the school principal, Nora Thombs, worked for the District when her children attended school, and gave them a hard time, and they felt it was very difficult to work with her. [Testimony of mother, P-413] For this reason, the mother did not want anyone from the District to test the student. [Testimony of mother] The mother was also upset that the student went before a bullying committee, and had been placed in a reflection room. [P-413] The mother wanted the student to have a private evaluation. [Testimony of mother]

6. The student continued to see Ms. Bock, and described being angry, frustrated and sad about school. [P-414]

7. Because the student had discipline problems on the school bus, bus driver Richard Harvey made him sit in the front seat. [P-425] On March 7, 2002, the student was sitting in the front seat of the bus riding home from school. [P-425, Tape of bus ride<sup>1</sup>] Mr. Harvey spoke to the student because the children behind him complained about him bothering them<sup>2</sup>. [P-425, Tape] Mr. Harvey told the student twice to, "turn around" and "get in your seat." [Tape] Mr. Harvey then shouted in a gruff, angry voice, "cut it out!" [Tape] He stopped the bus and turned around, and put one arm on the student's shoulder, shook it, then tightened his seatbelt. [P-425, 431] Mr. Harvey angrily yelled at the student, "Take another ride home somewhere else!" and "I'm sick and tired of you! Every night you don't do anything you're told to do." [Tape] Sometimes when Mr. Harvey tightened the student's seat belt it hurt, but

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<sup>1</sup> One of the District's exhibits was a tape of the school bus ride on March 7, 2002, henceforth "Tape" [sic]

<sup>2</sup> Although it is difficult to comprehend what the children are saying in parts of the tape, one clearly says, "[Student], give me it!" [Tape]

the student told the Deputy Sheriff that he was not afraid of Mr. Harvey. [P-431] After the mother learned of this incident, she would not permit the student to ride the bus to school.

8. On March 8, 2002, Ms. Ames wrote a letter to the mother telling her that she wanted to explore what she could do to meet the student's needs. [S-318] She scheduled a meeting with the mother, Brian Foster, Assistant Director of Special Services, Karla Bock, Nora Thombs, and Katie Perry, a special education teacher, "to create a plan to better address (the student's) needs here at school." [S-318] Ms. Ames asked Mr. Foster to attend because she wanted to discuss the possibility of special education for the student. [Testimony of B. Foster] The mother asked Ms. Ames to prepare a document about the Student's experience at school, which she did. [S-315-317] Ms. Ames explained that she had a behavior plan for the student, and that she tried to raise his self-esteem using this plan, but it did not work. [S-315] She said the student had very low self-esteem, was negative about school, and felt stupid. [S-315] Ms. Ames explained that the student vented his anger physically at other students, and showed no remorse for hurting others. [S-316] The student also refused to do his work, especially math. [S-316]
9. Ms. Ames prepared an agenda for the March 27, 2002 meeting, which included a discussion about both behavioral and academic concerns about the student. [S-314] In attendance were Ms. Bock, the grandmother, the mother, the father, Mr. Foster, Ms. Ames, Katie Perry, Marie Turner, Ms. Thombs, and the student's Title I teacher. [S-312, Testimony of mother] They discussed the student's progress in Title I reading, and other academic issues. [S-312] They also discussed the student's behavioral issues, and how he got an award for a week of positive behavior. [S-313] He often, however, lost his temper and acted out physically. [S-313] Mr. Foster and Ms. Perry, the special education teacher, were asked about the role of special education. [Testimony of B. Foster] Mr. Foster described what special education

services were, how a referral was made, and what testing was done. [Testimony of B. Foster] They discussed a wide variety of disabilities, and explained to the mother and father that they needed permission to evaluate the student to see whether he qualified for special education. [Testimony of B. Foster] The staff talked about how a special education evaluation might be appropriate. [Testimony of B. Foster] The mother refused to allow anyone in the District to evaluate the student. [Testimony of B. Foster, mother] When she said no during this discussion, Mr. Foster understood her to mean that she was not interested in special education at all. [Testimony of B. Foster] Consequently, Mr. Foster did not present the mother with paperwork regarding special education, and although he explained what the mother's rights were, she was not given procedural safeguards. [Testimony of B. Foster] Mr. Foster explained that the mother was an important participant in the PET meeting, and that she could have others attend the meeting, and bring her own evaluations, but added that the District could not move ahead without her consent, including her consent to evaluate the student. [Testimony of B. Foster]. The mother became very angry and upset with the principal, and left the meeting. [Testimony of mother] After five or ten minutes, she returned. [Testimony of B. Foster] Mr. Foster made a note that the District would not be testing the student for special education at that time. [S-313] He did not make a referral against the mother's wishes because he was not certain the student needed testing, as he was only half-way through xx grade. [Testimony of B. Foster]

10. On or about March 28, 2002, the student was in the Title I room, and had gotten out of control. He threw items around the room. [Testimony of B. Foster, S-309] While Ms. Turner and another staff member were talking about what to do, the student climbed into a storage cabinet. [Testimony of B. Foster] The cabinet was approximately five feet tall, four feet wide, and two feet deep, and had no doorknob or lock. The student climbed into the

side in which coats were stored, and would not come out until his uncle came to school and coaxed him out. [Testimony of B. Foster] As a consequence for this incident, the student was suspended from school for one day. [S-309]

11. Following the closet incident, the mother would not allow the student to return to school, and she refused to speak with any District personnel. [Testimony of mother, B. Foster] In April, the mother arranged for the student to receive tutoring at the Sylvan Learning Center in Augusta for three one-on-one hours per week, and three hours of small group services per week. [Testimony of mother]

12. At his April 8, 2002 session with Ms. Bock, the student said he wanted to go back to school, and his classmates had sent him a card saying they missed him. [P-417] On April 22, 2002, the assistant superintendent of schools wrote a letter to the mother about the student's absence from school, reminding her of the compulsory school attendance law. [S-311] He encouraged the mother to immediately contact the District to discuss the student's return.

[S-311] Ms. Ames provided packets of work for the student, and called several times, but the mother did not respond. [S-309] Ms. Bock then called Ms. Perry on April 22 to set up another meeting to return the student to school. [P-418] Ms. Perry attempted to reach the mother, but was unsuccessful. [P-418]

13. On April 26, 2002, after the student had been out of school for a month, Ms. Bock wrote a letter to Principal Thombs expressing her concern about the student's needs, and asking that he be excused from the time he had missed from school. [P-422-423] Ms. Thombs replied by letter dated May 2, 2002, that she agreed with Ms. Bock that there needs to be a meeting with the mother, the school and the special services department to make a plan for returning the student to school. [S-309] Ms. Thombs mentioned special education three times in the letter, including informing Ms. Bock that the mother refused to consent to evaluations to see

whether the student qualified for special education. [S-309] In response to Ms. Bock's question about how to assure the student's safety upon his return to school, Ms. Thombs was unsympathetic, and replied that they must be assured about the safety of the children whose learning environment the student has disturbed and threatened. [S-309] Ms. Bock sent the mother a copy of Ms. Thombs' letter on May 6, 2002. [P-418] Ms. Bock noted on May 16, 2002 that the mother was not pleased with the letter, and that she was uncertain whether she would attend the meeting. [P-418] Ms. Bock's notes also mentioned the mother telling her that she did not get the letter, and would not have known about it, had Ms. Bock not informed her. [P-419] The student's counseling with Ms. Bock ended in May 2002.

14. On May 21, 2002, the mother had the student evaluated at the Ervin Pediatric Center in Waterville, Maine. She thought the student might have Attention Deficit Hyperactivity Disorder (ADHD), and was concerned about his low self-esteem and worsening behavioral issues at school. [P-401] During his evaluation, the student reported that he was happy at home, and did not really like school. [P-406] He described his "scariest episode" as "When I lost my mother once. My father kicked me out, I was in the woods and my mother had to come find me." [P-406] The mother reported that the student made up this story, or it was a dream. [P-406, Testimony of mother] The student described the meanest adult as a woman unrelated to this proceeding. [P-406] The student was given the Integrated Visual and Auditory Continuous Performance Test (IVA), the Rey-Osterrieth Complex Figure Test (Rey-O), the Achenbach Child Behavior Checklist, Parent Version, and the Achenbach Teacher Report Form. [P-407] The IVA test results were invalid because the student either did not understand the instructions or did not put forth a reasonable effort. [P-409] The result on the Rey-O was also questionable, as his effort was quite poor. [P-409] Michael Nurick, the psychologist involved in the student's testing, urged the mother to reintegrate the



student back into the school program as soon as possible. [P-398-399] Dr. Nurick also recommended a psychoeducational evaluation to rule out the possibility of a learning disability. [P-399] The report concluded that a diagnosis of ADHD was not warranted.

[P-401] The mother did not share the test results with the District<sup>3</sup>. [Testimony of B. Foster]

15. On August 22, 2002, the mother found the student with his pants down in a tent with a nine or ten year old boy. [P-394] There were no signs of struggle or pain, but the mother took the student to the emergency room (ER). [P-394] The student denied any penetration, and there was no medical evidence of it. [P-394]
16. Principal Thombs retired, and was replaced by Cheryl Pike, who had gone to school with the mother's parents. [Testimony of mother] The mother met with Ms. Pike, and reenrolled the student in xx grade for September 2002 at the Cape Cod Hill School. [Testimony of mother] Due to the family's concern about bus transportation, the grandfather transported the student to school. [Testimony of mother]
17. On September 13, 2002, the student was admitted to Franklin Memorial Hospital for a behavioral evaluation after slapping a girl and stabbing a boy with a pencil at school that day. [P-391-393] The doctor reported that the student had "... explosive and uncontrollable behavior with a history of being a threat to others." [P-392]
18. After the student reentered xx grade, Mr. Foster checked with Ms. Ladd, the student's teacher, to see how things were going. [Testimony of B. Foster] The teacher reported that things were going reasonably well, and that they were working with the student assistance team. [Testimony of B. Foster] The student's report card noted some strengths and weaknesses, such as that the student worked well with "1 on 1 in reading" and "he completes very little writing but has many ideas," and "is very interested and enthusiastic

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<sup>3</sup> Mr. Foster did not see this evaluation until it was produced in conjunction with this hearing.

during science. Thought his lack of self control has often interfered with his learning.”

[P-386-387]

19. On November 14, 2002, the mother brought the student to Dr. Nurick for a psychoeducational evaluation. During testing, the student was motivated and displayed good effort. [S-307] His verbal IQ was 92 and performance IQ 119. [S-306] This discrepancy rendered the full scale IQ invalid. [S-306] Dr. Nurick’s findings were that it appeared the student had a “significant learning disorder” in reading, numerical operations, mathematics reasoning and spelling, but that it was impossible to say with certainty, because the student’s frequent absences from school may have affected his achievement scores and negatively impacted his learning abilities. [S-308] At some point, the mother brought this report to the principal, who shared it with Mr. Foster. Mr. Foster reviewed the report, and on February 6, 2003, called the mother to discuss it. [Testimony of B. Foster, S-442] He discussed a referral to special education, and that Dr. Nurick’s evaluation could be used. [Testimony of B. Foster] Mr. Foster explained the mother’s rights to her, and informed her that the District had an obligation to conduct its own evaluations. [Testimony of B. Foster] The mother responded that she did not want to make a referral to special education or have a first step Pupil Evaluation Team (PET) meeting at this time. [Testimony of B. Foster, S-442] The mother wanted to discuss this with others, and said she would get back to him, but she did not call Mr. Foster back. [Testimony of B. Foster, S-442] Mr. Foster followed up with the mother, calling her on March 6, 2003 to set up a time to meet. [Testimony of B. Foster, S-301] The mother suggested holding a PET meeting on March 10-13, but the District could not make the entire PET available in that time frame. [Testimony of B. Foster, S-301] Mr. Foster offered March 14, 18, 20 and 24, but the mother said she was only available until March 14. [Testimony of B. Foster, S-301] Mr. Foster attempted to discuss alternate meeting

times, but the mother refused. [Testimony of B. Foster, S-301] He again discussed the District's need to evaluate the student, and that he needed her written permission to do this. [Testimony of B. Foster, S-301] The mother became angry, and said Dr. Nurick's test was all they needed. [Testimony of B. Foster] She said she would not come to any PET meeting, and refused to allow anyone in the District to evaluate the student. [Testimony of B. Foster, mother, S-301] She also refused Title I support, said she was going to contact her attorney, and hung up the phone. [Testimony of B. Foster, S-301] The District did not send the mother procedural safeguards, as Mr. Foster did not send them to parents who were not "within the process." [Testimony of B. Foster] Based upon Dr. Nurick's evaluation, it was unclear to Mr. Foster whether the student would qualify for special education. [Testimony of B. Foster]

20. In January 2003, the student returned to counseling, this time with Jean Fine, LCPC. On February 11, 2003, the mother told Jean Fine she and the father had no legal custody agreement. [P-370] The mother stopped allowing the student to visit the father, which did not upset the student. [P-370] By early March, the mother thought that not visiting with the father was helping the student. [P-366] Ms. Fine felt that the student needed to find ways to calm himself other than leaving school. [P-337-371] In counseling, the student worked [sic] dealing with his anger, self-control strategies, including relaxation techniques, and self-esteem issues. The student's behavior both at home and in school improved. [P-360, 362, 363, 366] He reported that he liked his teacher very much. [P-363] By late May 2003, the mother reported that the student had few bad days, and that even these were much better than previously. [P-359] Two weeks later, the student's behavior worsened considerably following a weekend visit with his father. [P-358] The student refused to tell the mother or

Ms. Fine what happened at his father's house, except that he told Ms. Fine that his father was angry with him for making too much noise, but that he felt safe there. [P-358]

21. The mother was concerned that the student's classroom was too loud and distracting, and the student fought about going to school. [Testimony of mother] Consequently, the mother decided it might benefit the student to attend a smaller, quieter school. [Testimony of mother] For the 2003-2004 school year, the student attended Western Maine Christian Academy (WMCA). He was the only xx grader in a multilevel classroom of seven children of a variety of ages and abilities. [Testimony of mother]
22. In late August 2003, the student began having tonic/clonic seizures. [S-300] His neurologist commenced medication in September, but it did not help with seizure control, and caused side effects, including an increase in behavioral problems. [P-350, 347, 374-377] Consequently, the neurologist changed the student's seizure medication, which improved his behavior, but caused him to have difficulty waking in the morning. [P-372]
23. At WMCA, the Student had good days and bad days. [Testimony of mother] The student exhibited defiant and oppositional behaviors, and WMCA thought that if this could not be controlled, the student might not be able to continue attending WMCA. [P-343] By December, WMCA was prepared to ask the student to leave, as it did not have the supports needed to meet the student's needs. [P-340] On January 5, 2004, Cindy Thomas, the WMCA administrator, insisted that there be a plan in place before the student could return to school. [S-299] She offered to hire a teacher's aide at the mother's expense of \$150 per week to work directly with the student. [S-298] An aide was hired, and this worked well for the student. [Testimony of mother] Ms. Fine also contacted the Behavioral and Developmental Services (BDS) for assistance in finding a behavior specialist for the student. [P-337] BDS recommended enlisting the help of a case manager to facilitate services for the student.

[P-337] In April 2004, the mother told Ms. Fine that the student was not doing well at WMCA. [P-245]

24. In April 2004, the mother removed the student from school because of “intractable seizures.” [S-282] The mother reported that the student was having staring spells during which the mother reported the student had decreased hearing and speech. [P-329] On April 8, 2004, the student was admitted to Children’s Hospital for six days of long-term monitoring of his seizures. The student was taking anti-seizure medication, and the test results showed that during the week-long testing, the student did not have frequent daytime seizures, and did not have staring spells, nor were the episodes of difficulty with comprehension happening on a very frequent basis, thereby concluding that numerous electrographic seizures were not the cause of the student’s staring spells or current language dysfunction. [P-330, S-275] The student had a sleep activated EEG that did not meet the criteria for electrical status epilepticus of sleep (ESES)<sup>4</sup>. [P-326, S-275] The doctors also did not believe the student had any frank regression in his cognitive abilities. [P-326]
25. On both May 19, 2004 and September 8, 2004, Jean Fine again recommended that the mother look into case management services for the student for assistance with his education and other issues. [P-234, 242]
26. In the fall of 2004, the student returned to WMCA, and had the assistance of a one-on-one aide. On November 3, 2004, WMCA reported that the student’s classroom behavior was unpredictable and inconsistent, with no apparent pattern or antecedent to the student’s outbursts of refusal to work, cooperate or obey. [S-263] On that date, the administration of WMCA determined that it was not able to meet the student’s needs, and was terminating his

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<sup>4</sup> Despite this conclusion, the mother reported to WMCA that the student is borderline ESES. [S-267]

admission status, effective November 10, 2004. [S-265, P-317] In a letter to the mother dated November 10, 2004, the administrator wrote,

I realize you have expressed reservations about the school district, but they are obligated by law to assist special needs students. I would encourage you to tap into that free resource somehow. I would also recommend you try again to find a social worker caseworker for (the student).

[P-317] Enclosed in this letter was a statement of rights for special education assistance for home schooled and private school students. [P-317] The student did not attend school for the remainder of the year.

27. Around this time, the mother contacted Richardson Hollow Mental Health Services (RHMHS) for case management services. [P-314] During the intake process, the mother completed a form in which she responded, “somewhat true” to the statement, “I know what the rights of parent and children are under the special education laws.” [P-294] One of the student’s goals with RHMHS was to be enrolled and participating in school or an alternative education plan full time, and to be enrolled in school by January 30, 2005. [P-268] The family was assigned Sandra Wyman as case manager. [Testimony of mother, S. Wyman]
28. On November 18, 2004, Ms. Fine spoke with Dr. Andy Cook regarding his psychiatric consult with the student<sup>5</sup>. [P-228] Dr. Cook did not feel the student had ADHD, but opined that his difficult behaviors were the result of his complex seizure disorder. [P-228] The mother also reported this to Ms. Fine on December 21, 2004. [P-224]
29. Ms. Wyman encouraged the mother to contact the District, as it was the District’s responsibility to educate the student. [Testimony of mother] Ms. Wyman had worked with the District with other children receiving special education. [Testimony of B. Foster] She had not had any problems dealing with the District, and did not feel the District was “throwing up barriers.” [Testimony of S. Wyman] Ms. Wyman spoke with Ed Ferreira,

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<sup>5</sup> No written report of this consult was produced or introduced into evidence.

District Special Education Director, on December 8, 2004 to set up a meeting to return the student to school and discuss educational options. [P-264] Mr. Ferreira explained that the Superintendent of Schools would also need to attend because of the mother's resistance to returning the student to his neighborhood school, Cape Cod Hill School. [P-264] The mother did not tell either Ms. Wyman or Mr. Foster that the student had been dismissed from WMCA, due to his behaviors. [Testimony of S. Wyman, B. Foster] The mother did not share the dismissal letter with Ms. Wyman, who did not discuss special education with the mother initially because the student had good grades at WMCA, and Ms. Wyman was not aware that he had educational limits at that time. [Testimony of S. Wyman] Ms. Wyman explained to the District that the mother did not want the student to return to the Cape Cod Hill School. [Testimony of S. Wyman]

30. A meeting was held on January 3, 2005 to discuss the student's return to public school.

[Testimony of B. Foster] In attendance were the student, his mother, Mr. Foster, Mr. Ferreira, Ms. Wyman, a teacher, tutor and others. [S-257, Testimony of S. Wyman] The plan was to enroll the student at the Cascade Brook School (CBS) as soon as possible, and start with individual tutoring for two hours per day, then ease him into regular classroom activities. [Testimony of B. Foster, S. Wyman, S-257] The mother gave the superintendent several documents from WMCA, including: (1) a letter dated January 4, 2004, discussing options for dealing with the student's behavioral challenges [S-298-299]; (2) Academic Instruction Proposal dated August 26, 2004 [S-266]; (3) letters from Maine Neurology dated February 11, 2004 and March 31, 2004 regarding the student's seizures [S-285-286, S-292-293]; and (4) letters dated April 7, 2004 and April 10, 2004 from Children's Hospital about the student's seizure disorder. [S-268, S-280] There was no mention of the November 2004 evaluation done by Dr. Nurick. [Testimony of S. Wyman] Ms. Wyman offered to assist with

transportation issues. [Testimony of S. Wyman, P-125] The superintendent asked about a referral to special education, and Mr. Foster responded that the mother did not want the District to evaluate the student. [Testimony of B. Foster] Mr. Foster did not explain the importance of testing with respect to identification for special education at that time.

[Testimony of B. Foster]

31. The next day, Mr. Foster spoke with Sheena Thomas at WMCA, and learned that the student had been asked to leave in late October, and they discussed his behavior issues.

[S-258]

32. On January 18, 2005, there was another meeting attended by Nicole Goodspeed, CBS principal, Ms. Wyman, the mother, grandmother, grandfather and Mr. Foster to discuss the student's reentry plan. [Testimony of N. Goodspeed, S-256] Everyone was comfortable with the transition plan. [Testimony of N. Goodspeed] They discussed not knowing where the student was academically, and Mr. Foster said that special education was not an option because the mother was not interested<sup>6</sup>. [Testimony of N. Goodspeed, B. Foster] Mr. Foster was against forcing a child into special education against his parent's wishes, as in his experience, it did not work. [Testimony of B. Foster] There was agreement that Jan Dodge could conduct DRA and Key Math testing, as the family knew Ms. Dodge and felt comfortable with her. [Testimony of N. Goodspeed, B. Foster] The District wanted to determine whether the student would benefit from the Title I program. [Testimony of B. Foster]

33. On January 17, 2005, the student began attending CBS. [P-223] Joy Cross tutored the student for two hours each day, and this went rather well. [Testimony of mother, P-120, S-251] The plan also involved working with Mr. Hardy, a xx grade teacher, to integrate the

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<sup>6</sup> There was no evidence that the mother contradicted this representation.



student into the classroom. [Testimony of N. Goodspeed] The plan was to have regular meetings to see how the student was progressing. [Testimony of N. Goodspeed, B. Foster] At the March 24, 2005 meeting, Ms. Dodge discussed the results of her assessments, which showed that the student's grade level ability on key math was 2.4, but should be around 4.7. [S-251] On the DRA, the student was reading at a first or second grade level, but Ms. Dodge did not feel this was a true picture of the student's ability because he refused to read the book she gave him, and did not really participate in the testing. [Testimony of B. Foster, S-251]

34. In addition to his tutoring, the student attended Mr. Hardy's mainstream classroom for independent reading and snack time. [Testimony of N. Goodspeed, S-253] On April 27, 2005, Mr. Hardy expressed his concern to Dr. Goodspeed that the student "will be very behind the class in math and language arts." [S-248] There was a meeting on May 17, 2005, attended by both special education directors, the student, mother, grandmother, grandfather, Ms. Cross, Ms. Dodge, Mr. Hardy, Ms. Wyman, Martina Arnold, guidance counselor, and Dr. Goodspeed. [S-246, Testimony of N. Goodspeed] Attendees discussed the student's educational program for the current and upcoming school years. Ms. Dodge said the student's performance on both the DRA and Key Math assessments were at a mid-second grade level. [S-246, Testimony of N. Goodspeed] Mr. Hardy noted the student's cooperativeness and appropriateness in the xx grade class. [S-246] Ms. Cross noted that the student had good intelligence, but also has a tendency to try to avoid work. [S-247, Testimony of N. Goodspeed] Dr. Goodspeed expressed her concern about the student's sporadic attendance, as he did not attend school regularly, and was often either late or went home early, and that this interfered with his learning. [Testimony of N. Goodspeed, S-247] It also interfered with the ability to integrate the student more quickly into the classroom.

[Testimony of N. Goodspeed] The mother said that the student fatigued easily, which she attributed to his seizure medications, and therefore could not attend school for the entire day.

[Testimony of Mother, N. Goodspeed] To address the student's low skill level, the group agreed that the student would have additional tutoring time, from 8:00 a.m. until 11:00 a.m., then would go to Mr. Hardy's class until 12:10, including having lunch and recess with his class. [Testimony of N. Goodspeed, S-247] Efforts to increase the student's day were not successful, however, due to the student's behavioral problems, and he returned to two hours of tutoring. [Testimony of N. Goodspeed, S-244] The District did not offer the student tutoring during the summer. [Testimony of S. Wyman]

35. Although the mother never asked Dr. Goodspeed about special education, in June, she did ask about a one-on-one aide for the student. [Testimony of N. Goodspeed, B. Foster] Dr. Goodspeed said she could not provide this, but could go through special services to obtain this service. [Testimony of N. Goodspeed] Dr. Goodspeed did not bring up the issue of testing, but only mentioned a referral to special education, to which the mother responded, "No one in SAD 9 is going to test my child!" [Testimony of N. Goodspeed] Dr. Goodspeed responded that if the mother did not want her child to be tested, she had to talk to the central office, either special services or the superintendent. [Testimony of N. Goodspeed] She also discussed this with Mr. Foster, and asked him for advice. [Testimony of N. Goodspeed] Dr. Goodspeed was very concerned about the student in the coming year. [Testimony of N. Goodspeed] Because the longer day failed, Dr. Goodspeed insisted on making a referral to special education at that point, regardless of whether the mother consented. [Testimony of N. Goodspeed, B. Foster] She had initially waited because the student was new to CBS, and she was trying to gain the family's trust, and did not want to get into an argument with them about special education. [Testimony of N. Goodspeed] Mr. Foster prepared the referral

paperwork. [Testimony of N. Goodspeed] The District used what it called a one-step referral process. The District sends the parent a referral form with the reasons for the referral, a consent for evaluations form identifying the types of evaluations needed, and parental rights and procedural safeguards (henceforth “procedural safeguards”). [Testimony of B. Foster, S-239] Mr. Foster spoke with the mother regarding the types of testing to be done to determine eligibility for special education. [S-240] The District then mailed a letter dated June 17, 2005 to the mother with the referral form. [Testimony of B. Foster, S-239] In addition to the referral form, this letter noted that other documents were enclosed, specifically a consent for evaluation form and procedural safeguards. [S-239] Mr. Foster also sent a letter to the mother explaining the referral, and the need for written permission to conduct an evaluation of the student. [S-238] The tests requested included academic achievement testing, cognitive testing, a classroom observation, and learning development tests. [S-238] The letter further acknowledged that the mother had told the superintendent that she was pursuing evaluations at her own expense outside of the District. [S-238] Mr. Foster wrote that it was the mother’s right to do this, and that the PET would consider these evaluations and determine whether they were adequate to meet the legal requirements for special education determinations. [S-238] Mr. Foster further explained that he was required by law to contact the Father regarding this referral, and that if either parent signed the written permission form, the District was required to proceed with the evaluations. [S-238] On June 20, the mother told Ms. Wyman that she was extremely upset with the District, as she was informed that the special education department would like the student tested to determine his eligibility for special education services. [P-103] The mother also told Ms. Wyman that the District did not contact her for permission for testing, but that they had contacted the father. [P-103]

36. The mother would not consent to testing with the District. [Testimony of mother] The District's position was that until the student was evaluated and identified for special education, he would have to be placed in the regular classroom. [Testimony of N. Goodspeed] On August 23, 2005, Ms. Wyman encouraged the mother to allow the student to be evaluated, and offered to call the District to discuss the student's educational plan. [P-97] She spoke with Mr. Foster on August 29, who explained that both parents had been sent a letter at the end of the school year with a consent to evaluate form, and neither parent sent them back. [P-96] He told Ms. Wyman how upset the mother was about the father receiving this form, and that this was more of an issue than any further discussion about the student's evaluation<sup>7</sup>. [P-96]
37. In September, the student returned to CBS in Mr. Loring's xx grade regular education classroom. [Testimony of N. Goodspeed] Guidance counselor Martina Arnold was assigned to work with him to assist him with his behavioral issues. [Testimony of N. Goodspeed] Mr. Loring allowed the student to leave the classroom to visit Ms. Arnold, although it was not part of any formal behavior plan. [Testimony of N. Goodspeed] The student exhibited behaviors such as yelling, screaming, spitting on things and flinging boogers on other students' desks. [Testimony of N. Goodspeed]
38. Dr. Goodspeed asked Ms. Wyman for help in obtaining the mother's consent for special services. [Testimony of N. Goodspeed] On September 6, 2005, Ms. Wyman met with the mother and discussed the special education referral and consent to evaluate form. [P-94] The mother again insisted that she did not want the District to do an evaluation of the student, and that she wanted her own evaluator. [P-94] Ms. Wyman noted that the mother was "extremely angry throughout this visit and continues to be upset" with the District. [P-94]

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<sup>7</sup> There was no evidence of any legal arrangement or order restricting the Father's role in educational decision-making.

The mother was also angry with the school because the student had fallen off a piece of playground equipment. [P-95] CBS called her to report the incident, and said that the student was fine, but the mother chose to take the student to the ER. [P-95] The mother was angry with the ER personnel because they told her that this was not a serious injury, but the mother thought they did not know what they were talking about. [P-95]

39. On September 9, 2005, Dr. Goodspeed called Ms. Wyman to ask her to come to a meeting at school request. [P-95] Dr. Goodspeed reported a tremendous amount of resistance from both the student and the mother, and Mr. Loring was beginning to see some behaviors of concern. [P-95] Dr. Goodspeed wanted everyone to meet to get a sense of what was going on and to encourage the student to have a positive year. [P-95]
40. Dr. Goodspeed, Ms. Wyman, the mother, the grandmother, the grandfather, Mr. Loring, and Ms. Arnold, attended the September 12, 2005 meeting. Mr. Loring explained how the student was unwilling to do his work, defied authority and was insubordinate. [P-93] Ms. Wyman felt that the mother and grandparents continued to make excuses for the student's behavior, rather than holding him accountable for his actions. [P-93]
41. In September 2005, the Mother arranged for a private psychoeducational evaluation with Dr. Nurick, which occurred on October 3, 2005. [P-94, Testimony of mother] She provided the District with the report later that month. [Testimony of B. Foster, N. Goodspeed, S-234-237, 238-41] Dr. Nurick reviewed the student's records, and administered the Wechsler Intelligence Scale for Children (WISC-IV), Wechsler Individual Achievement Test (WIAT-II) and the Rey-O. [S-234] On the WISC-IV, the student's scores were: verbal comprehension - 93, perceptual reasoning – 102, working memory – 86, processing speech – 78 and full scale IQ – 88. [S-235] His composite scores on the WIAT-II in mathematics and written language were in the first percentile, and his reading composite was in the 16<sup>th</sup>

percentile. [S-236] Dr. Nurick concluded that the scores suggested relatively average range higher level cognitive abilities in terms of verbal comprehension and visual spatial reasoning, but very significant weaknesses with the speed of the student's visual processing and working memory. [S-236] His performance was extremely poor on the Rey-O, which constituted a disorder in the basic psychological processes. [S-237] Dr. Nurick thought the scores indicated significant concerns with learning disabilities in the areas of written expression, numerical operation, math reasoning, spelling, and reading words. [S-237] He added that it was very important that the student attend school daily to provide him with as much academic exposure as possible, as his poor attendance may have contributed to his current learning problems. [S-237]

42. In October 2005, the student began counseling with Nancy Priest, LCPC, with a goal of controlling his anger. [P-142] The student continued to have many disciplinary problems, and was frequently in Dr. Goodspeed's office. [Testimony of N. Goodspeed]

43. The District evaluator, Susan Siegler, reviewed Dr. Nurick's report, and discussed with the mother the additional testing she believed was needed to make an eligibility determination. [Testimony of B. Foster] On November 6, 2005, the mother finally agreed to have additional assessments done, consisting of a classroom observation and learning development testing. [S-232, P-141] The District did not insist on obtaining its own psychoeducational evaluation. The PET then met on December 14, 2006, considered all of the test results, and concluded that the student was eligible for special education as a student with a learning disability. [Testimony of B. Foster, N. Goodspeed, S-198-206] The meeting was very positive and upbeat, as everyone felt very good that the student was finally going to be receiving the services he needed. [Testimony of N. Goodspeed] The student's IEP provided for 60 minutes of direct instruction in math daily, and 80 minutes of direct instruction daily

in language arts because of his below grade level abilities in those areas. [S-207] He was mainstreamed for the remainder of his school day. [S-208] The IEP had a behavior plan, as well as behavioral goals and objectives. [S-213, 214, 220] Everyone agreed to the goals, objectives and behavior plan. [Testimony of D. Wilber] The mother did not express any concerns about it, and there was no discussion about, nor did the plan contain, a provision allowing the student to spontaneously leave the classroom without permission whenever he felt the need to do so. [Testimony of D. Wilber, S-220] Darcy Wilber, a teacher with experience in working with students with behavioral problems, and trained in crisis prevention and intervention, was the student's case manager and special education teacher. [Testimony of D. Wilber] Right after the meeting, Ms. Wilber told the mother she would be receiving a copy of the IEP in the mail shortly. [Testimony of D. Wilber] This was mailed to the mother on January 23, 2006. [Testimony of B. Foster, S-207]

44. Ms. Wilber began working with the student in January 2006. [Testimony of D. Wilber] Thereafter, Dr. Goodspeed did not see the student in her office as often for disciplinary reasons. [Testimony of N. Goodspeed] The student's disruptive behaviors in Ms. Wilber's class began to increase when he was not doing his work. [Testimony of D. Wilber] He would leave the room without permission, or bang his fists on the desk. [Testimony of D. Wilber, S-387] Although there was a provision for the student to go to Ms. Wilber's room if he needed a break from Mr. Loring's class, there was no plan for the student to leave Ms. Wilbur's classroom, and this was never discussed with the mother. [Testimony of D. Wilber] Because the behavior plan was not working, Ms. Wilber asked to consult with the school social worker, Steve Brod, about it. [Testimony of D. Wilber]
45. On January 31, 2006, the student was refusing to do his work, and engaging in disruptive behavior. [S-388] Because he had not done his work, Ms. Wilbur made him stay inside for

recess. [S-388] The student started walking towards the door, but Ms. Wilbur stepped in front of him, and told him to take a seat. [S-388] The student responded that he was just pretending to leave, and sat down. [S-388] Ms. Wilbur sat in front of the door for the remainder of the afternoon. [S-388]

46. On February 2, 2006, the student arrived in Ms. Wilber's room at 12:15 p.m. [S-388] He went to see the nurse at 12:30 p.m., but she sent him back to Ms. Wilbur's room because she was too busy. [S-388] Ms. Wilbur told the student he could rest in her room, which he did. [S-388] The nurse came to check the student's temperature, which was normal. [S-388] The student began doing work, but did not want to copy his writing prompt. [Testimony of D. Wilber, S-388] He began banging his fists on the desk, then started lifting up the desk and slamming it to the floor. [Testimony of D. Wilber, S-388] Although the educational technicians asked the student to stop, he would not, so they moved the desk away. [Testimony of D. Wilber, S-388] Ms. Wilbur then asked one of the educational technicians to remove the other students from the room so that only Ms. Wilbur, Ms. Dunham, an educational technician, and the student remained. [Testimony of D. Wilber, S-388] They tried to help the student settle down. [Testimony of D. Wilber, S-388] The student wanted to leave, but Ms. Wilbur said no. [Testimony of D. Wilber, S-388] She was not standing near the door, nor did she block the door at any time. [Testimony of D. Wilber] The student did not try to exit the classroom, but charged at Ms. Wilbur, who moved out of the way. [Testimony of D. Wilber, S-388] She warned the student that if he did that again, they would have to restrain him so he would be safe. [Testimony of D. Wilber, S-388] He charged at Ms. Wilbur again, and made direct contact with her, so Ms. Dunham restrained him. [Testimony of D. Wilber, S-388] After the restraint ended, the student sat quietly on the floor for a while. [Testimony of D. Wilber, S-388] The mother picked him up from school.



[Testimony of D. Wilber, S-388] The student was then suspended from school for five days for his behavior. [Testimony of N. Goodspeed, S-388, 385]

47. When the mother spoke with Dr. Goodspeed following the student's suspension, she reported that she did not want the student in Ms. Wilber's room any longer, as he was afraid of her. [Testimony of N. Goodspeed, mother] When Dr. Goodspeed explained that she did not have the authority to make such a change, but that special services did, the mother became angry and agitated, said the student would not be coming back, and took the student home. [Testimony of N. Goodspeed] This was the first time Dr. Goodspeed learned that the Mother wanted the student to be able to leave the classroom when he chose to. [Testimony of N. Goodspeed] Dr. Goodspeed called the mother the following day and referred her to Mr. Foster about a change in the student's special education placement. The mother again became angry and hung up on Dr. Goodspeed when the latter suggested a meeting at school. [Testimony of N. Goodspeed]

48. Steve Brod spoke with Nancy Priest following the restraint. [S-186] Ms. Priest expressed her opinion that the student had been "retraumatized" by the restraint, although she was not opposed to the student "working it through." [S-186] The student told Ms. Priest that he felt trapped by the teacher, and how he was restrained until he calmed down. [P-522] The student paced about the room and trembled as he talked about the incident. [P-522] He said he did not "know why he has a voice that tells him not to do the school work or why he listens to it." [P-522] Several months later, the mother asked Ms. Priest to write an opinion that the student could not attend school at CBS with Ms. Wilbur as his teacher. [P-516] Ms. Priest did not do this, but wrote a letter relating what happened at the student's counseling session on February 8, when he discussed the incident. [P-515, S-73]

49. On February 27, 2006, there was a meeting held at the mother's request to discuss an appropriate placement for the student. [Testimony of N. Goodspeed, S-184] The mother, grandparents, Ms. Wyman, Dr. Goodspeed, Mr. Foster, Mr. Brod and Mr. Ferreira attended. [S-182] Although there was some discussion, the group agreed to convene a PET meeting on March 8 to discuss the mother's request for an occupational therapy (OT) evaluation, and to review and revise the behavior plan. [S-183] At that meeting, the PET agreed to allow the student to attend a different District school, Academy Hill School (AHS), with the existing IEP and a revised behavior plan. [S-163] Mr. Ferreira also agreed to the mother's request for an OT evaluation, but the mother decided that she would pursue one privately. [S-165] During this meeting, the grandfather told the PET that the student had been sexually abused by an eleven-year-old boy, referring to the incident in fact #15 above<sup>8</sup>. The District personnel were shocked both at the delivery and content of this disclosure, and had no previous knowledge of it. [Testimony of N. Goodspeed, D. Paine]
50. On March 15, 2006, Pamela Perry, OTR/L, completed an OT evaluation of the student, which showed delays in visual motor integration skills, hand dexterity, sensory processing, and handwriting speed. [S-157] The PET consequently added 30 minutes per week of OT services to the student's IEP. [S-51]
51. Although the student could have started attending AHS immediately, the mother kept him out of school while discussions continued about the student's behavior plan. [Testimony of K. McShane] Darlene Paine, principal of AHS, Kevin McShane, the student's new special education teacher at AHS, the mother, the grandparents, Joan Kelly, the mother's advocate, and others met several times, including over April school vacation, to discuss changes to the behavior plan, including the mother's seven-page proposed plan. [Testimony of K.

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<sup>8</sup> As noted in Fact #15, there was no evidence that the Student was sexually abused.

McShane, D. Paine, Mother, S-123-129] Ms. Kelly felt that more detail was necessary in the student's present levels of performance, and the mother continued to advocate for such changes to the IEP over the next several months. [Testimony of mother, D. Paine] In light of the mother's concern about the student's experience with bus driver Richard Harvey in xx grade, the District tried to be flexible about providing transportation for the student.

[Testimony of D. Paine] The parties were close to reaching an agreement to have the District transport the student to school, when the grandfather said he would not agree to transportation by anyone supervised by Dave Leavitt, the Director of Transportation. [S-150, Testimony of D. Paine] This eliminated any possibility of District transportation, and the mother agreed with him. [S-150, Testimony of D. Paine] The mother also continued to insist that the student attend school for only half the day. [Testimony of S. Wyman] AHS was willing to accommodate any need the student had to rest during the day. [Testimony of S. Wyman] At an April 25, 2006 PET meeting, the PET discussed how the student would miss science and social studies by only attending school for half the day, but the mother was not concerned about this. [Testimony of D. Paine] A main goal for the District was to make the student feel safe and nurtured, build the student's trust and meet his emotional needs. [Testimony of D. Paine, K. McShane] The mother agreed to allow him to start school at AHS on May 1, but only for half a day. [Testimony of D. Paine]

52. On May 4, 2006, the student had a neuropsychological evaluation, conducted by Robert Perna, Ph.D. [S-113] Dr. Perna found that the student had intellectual abilities in the low average to average range, with relative weakness to mild impairment in working memory, information processing speed, alternating attention, visual motor integration, and visuoconstructional skills. [S-120] Dr. Perna thought the student's fatigue could be attributable to his Depakote medication, poor sleep quality or sleep hygiene routines.

[S-120] Although the student had no significant mood or personality problems, his behaviors warranted continued counseling, and Dr. Perna recommended addressing this before the student fell further behind in school. [S-120] Dr. Perna was also concerned that the student was not attending school regularly, and was so far behind his peers academically. [S-120] One of his recommendations was “it will be very important for (the student) to starting [sic] attending school regularly and have an agreed upon plan with the school as to how conflicts should be dealt with.” [S-121] Dr. Perna also felt it was very important for the mother to assist the student in developing a healthier opinion about school and the need to listen and follow the directions of his teachers. [S-121]

53. Beginning on May 1, 2006, the student attended Mr. McShane’s special education class for most of the morning. [Testimony of K. McShane] Christina Davis, an educational technician whom Mr. McShane specifically requested be transferred from another school to work with the student, assisted Mr. McShane. [Testimony of K. McShane] It was very unusual for a student to attend a behavioral program for half a day because the student did not have the opportunity for the social parts of school, such as lunch and recess. [Testimony of K. McShane] The student also had a strong interest in science, which Mr. McShane thought would be a “hook” he could use, but the student missed it most days by leaving school at noon. [Testimony of K. McShane] He was mainstreamed in Mr. Maltz’s xx grade class for “specials.” [S-84]

54. In May, the mother requested compensatory services and ESY for the student. [S-76] Mr. Ferreira would not agree to compensatory services. [S-74] Although the District did not believe there was evidence that the student would regress without ESY services, the PET determined that it would provide the student with 30 hours during the summer of 2006. [S-50] Mr. Ferreira agreed to this because the student had missed a lot of school, and he

wanted the student to be in the best possible position when he reentered school in the fall.

[S-74] The District contracted with Amie Williams, an educational technician selected by

the mother, to provide tutoring for the student. [Testimony of A. Williams] The

grandparents then asked Ms. Williams to tutor the student for 40 additional hours that

summer. [Testimony of A. Williams, P-3] Neither Ms. Williams nor the family told the

District about the additional hours. The student had a successful summer, as he worked well

with Ms. Williams and his skills improved with tutoring. [Testimony of A. Williams, P-2-3]

55. The student's IEP was amended at the June 19, 2006 PET meeting to change the student's behavior plan and revise the written language goals. He continued to receive the same amount of direct special education instruction as in the prior year's IEP goals, and 60 minutes of consultation each month with the school social worker was added to address the issues that might arise with the student's behavioral objectives and plan. [S-51, Testimony of K. McShane] Ms. Kelly requested changes to the present levels of educational performance, but no changes were made. [S-50] The present level of educational performance mentioned the areas of the student's learning disabilities, and his difficulty with visual motor organization skills. [S-51] It further noted the student's educational weaknesses, and the support he will need to address those weaknesses. [S-51] The IEP did not mention whether the student needed regular or special transportation. [S-52] The student had the following short-term objectives in his IEP: 5 written language [S-58], 20 behavior objectives geared towards his self-regulation and motivation difficulties [S-61, 62, 69], 7 math [S-65-66], 5 spelling, 5 reading [S-67], and five OT. Most of these short-term objectives had progressive measures of the student's progress, and were sufficiently specific. Although there is no indication on page 2 of the IEP whether the student's behavior impeded

his learning or the learning of others, he had a behavior plan, although it was not attached to his IEP. [S-106-110]

56. On August 31, 2006, the family and District administrators met to discuss several issues, including the student's transportation. Ms. Paine again offered District transportation for the student, including non-bus transportation. [S-21, Testimony of D. Paine] The mother refused to agree to any transportation that was under the supervision of the Director of Transportation. [Testimony of D. Paine]

57. The student was excited to return to school in the fall. [Testimony of S. Wyman] Mr. McShane expected the student to attend a full day in the fall of 2006, as the part-day program was intended to be temporary. [Testimony of K. McShane] Mr. McShane wanted to help the student adjust to attending a full day of school, and be "a regular kiddo." [Testimony of K. McShane] Instead, the student looked for excuses to call home and ask to be picked up. [Testimony of K. McShane] When the student arrived at school, it was sometimes prearranged that he would leave early, regardless of how the day went. [Testimony of K. McShane] His attendance was also irregular in that he was absent from school more often than other children. [Testimony of K. McShane] During the fall of 2006, Ms. Wyman encouraged the mother to allow the student to stay in school longer, as he would never get caught up otherwise. [Testimony of S. Wyman] The mother and grandparents did not think the student was ready for this, but the AHS staff understood the mother's concern about the student becoming fatigued, and remained willing to accommodate his need to rest in the middle of the day. [Testimony of S. Wyman] The mother was also adamant about giving the student access to the school phone to call her to either calm down or go home. [Testimony of K. McShane] It is highly unusual for a xx grader to be able to decide to stop what he is doing at school to call his mother whenever he

feels the need. [Testimony of K. McShane] Mr. McShane felt that the student used this device to avoid doing his work. [Testimony of K. McShane, S-340, 342]

58. When students in Mr. McShane's class told stories that were not true, they were not called liars, but were encouraged to write it in their journal or otherwise deal with it in a positive way. [Testimony of K. McShane] When the student told an exaggerated story to his occupational therapist, however, she did not handle it this way, and "called him on it, which upset him.[sic] [Testimony of K. McShane, S-355] Thereafter, the mother would not allow the student to receive OT again until she had personally spoken with the occupational therapist. [S-355, Testimony of K. McShane] Many weeks passed before the mother called the occupational therapist, and the student was upset that someone else was getting his OT time. [S-351, 355, Testimony of K. McShane]

59. On January 3, 2007, there was a meeting that resulted in a formal decision to lengthen the student's school day. Ms. Wyman again encouraged the mother to agree to this, and thought it would be excellent for the student, although the mother was reluctant. The student began staying longer, and was attending until 2:00 p.m. at the time of this hearing. [Testimony of K. McShane, S. Wyman] The regular school day ends at 3:00 p.m. Mr. McShane did not see any physical reason why the student could not stay at school, as he did not appear tired most days, nor did he fall asleep in class. [Testimony of K. McShane] Although the mother has produced all of the relevant medical records, there were no limitations from any doctors that the student could only attend a partial day program at school. [Testimony of mother] If the student were tired, he had the opportunity to rest. [Testimony of K. McShane, S-332] Not having the student attend a full day has been a considerable barrier to what the school can do for him. [Testimony of K. McShane] Mr. McShane has found that the student has many interests, and likes to share them. [Testimony of K. McShane] Although behaviorally, he

can be a “handful,” most of the time, he is an absolute joy to have in class. [Testimony of K. McShane] The student’s behavioral needs are considerable, but the program is attending to almost all of them. [Testimony of K. McShane] The student has not learned basic human interaction skills with peers, so they work on socialization skills. [Testimony of K. McShane] Mr. McShane is also concerned that the student needs to “buy into” AHS, as the student’s view of school has been colored by his family’s characterization of the District as the enemy. [Testimony of K. McShane] On January 31, 2007, to facilitate the student’s full day attendance at school, Ms. Paine again offered to meet to discuss District transportation for the student. [S-447]

60. Mr. McShane graded the student’s goals and objectives, and sent them home with the student’s report card. [S-449-455] These did not coincide exactly with the student’s IEP because Mr. McShane used the student’s IEP from his working file, which was different than the copy in the student’s cumulative file, although most of the goals were the same on each. [Testimony of K. McShane, S-449-455] The student had either satisfactory progress or limited progress on his goals and objectives. [Testimony of K. McShane, S-449-455]

#### **IV. DISCUSSION AND CONCLUSIONS**

**Position of the Parents:** The District flagrantly breached its child find duty upon the student’s reenrollment in the District in January 2005. The District had seen evaluations that indicated a likelihood that the student had a learning disability, and were well aware of the student’s behavior issues which impeded his learning, yet it failed to offer an opportunity to participate in a PET meeting to discuss a referral, and failed to provide the mother with procedural safeguards so she could make an informed choice. The mother’s expressed reluctance to permit testing by a District evaluator cannot be equated with an intention to refuse the special education services, as it is possible to make an eligibility determination without any testing conducted by the District. Because



the student should have been referred to the PET, he received no special education services during 2005, and was thus denied a free appropriate public education that year.

The student was also denied FAPE during 2006 and 2007. The behavior plan in the IEP, which did not reflect the discussion at the PET meeting, caused the student's behavior problems to escalate, thus resulting in him not receiving an appropriate education. During the three months following the student's withdrawal from that inappropriate program, the student was not receiving any educational services. Once the student returned to school on May 1, 2006, he was only given a partial day schedule. Because the student's medications made him so tired that he could not sustain a normal school day, the District should have accommodated this by providing additional tutorial services later in the afternoon after the student had the opportunity to rest. The student's 30 hours of summer programming was insufficient to have any compensatory effect. The student's program for the 2006-2007 school year has been one of stagnation, both behaviorally and academically. The IEP completed on June 19, 2006 contained several substantial flaws, including the failure to establish concrete present levels of educational performance, measurable annual goals, benchmarks or short-term objectives, special transportation, and a behavior intervention plan. It also failed to provide afternoon tutorial services needed to meet the student's unique needs. The student is most successful, both academically and behaviorally, when tutored in a highly structured program with accommodations. Because the District has denied him an appropriate education for an excess of two years, and he lags behind both academically and behaviorally, the student should be awarded compensatory education in the form of tutoring from Amie Williams as a remedy for the District's past programming deficiencies. The District should also pay for additional tutoring provided by Ms. Williams in the summer of 2006, and revise the student's 2006-2007 IEP.

**Position of the District:** This case involves a family that has disliked the District for a number of generations, and has refused to work cooperatively with the District for that very reason. Over the

years, the District made repeated offers to the mother to assess the student for special education, but she refused to allow the District to evaluate the student. The fact that the District did not convene a PET meeting to discuss evaluations first does not help the mother's position, as Federal law clearly allows decisions to be made about special education testing without convening an eligibility team. Despite the mother's refusal to consent to evaluations, the District made a number of significant efforts outside special education to address the student's needs, and did all that it could, absent the mother's cooperation. When the school principal finally made a referral to special education, the mother did not act upon it for five months.

Once the mother finally agreed to a referral and testing, District officials processed it swiftly, identified the student and ordered excellent programming. The family quickly undercut the program by pulling the student as soon as he began to resist appropriate behavioral limitations by a skilled teacher, and refused to access the programming available to the student. Nonetheless, the District kept working to address the situation, going to great lengths to work with the family, and offering yet another elementary school program for the student. The family failed to prove that the District's ESY program was inappropriate, and there was no evidence that the student had a problem with regression or loss of skills previously mastered.

Despite the family's insistence on shortened school days, their refusal to attend PET meetings, and their rejection of various parts of the program, dedicated staff has worked hard with the student, and is now beginning to see important signs of progress. The family, on the other hand, has failed to produce one iota of evidence showing that either the student's IEP or behavior plan was in any manner faulty. Additionally, it was the mother's decision to keep the student out of school, which was a significant cause of any lack of academic progress. The District cannot be blamed for the many roadblocks placed by the mother that were beyond the District's control. Therefore, the Hearing Officer should reject the family's claims for relief.

**1. The District failed to meet its IDEA child find or referral obligations from January 2005 to June 2005.**

The IDEA places an affirmative, ongoing obligation upon school administrative units to identify and evaluate all children within the jurisdiction suspected of having disabilities and needing special education. 20 U.S.C. §1412(a). This includes students who are suspected of having disabilities, even though they are advancing from grade to grade. Maine Special Education Regulations (MSER), §7.2. Because the child find obligation is an affirmative one, a parent is not required to request that a district identify and evaluate a child, and a parent's failure to make such a request does not relieve the district of its child find obligation. *Robertson County School System v. King*, 24 IDELR 1036 (6th Cir. 1996). Districts are required to obtain data on each student, through direct assessment or indirect means, such as the student's academic performance, and must do this during the first 30 days of enrollment. MSER §§7.3, 7.4. If this child find process indicates that a student may require special education and supportive services to benefit from the educational program, the student shall be referred to the PET to determine the student's eligibility. MSER §7.6.

The mother testified several times that no one in the District offered the student special education testing, and that she knew nothing about special education, but assumed it was for children with mental retardation. [Testimony of mother] Her testimony was not included in the findings of facts set forth above because it was not credible. The most obvious example of the unreliability of the mother's testimony was her vehement denial at least three times while testifying under oath that she either never saw the May 2, 2002 letter from Ms. Thombs, or that she did not see it prior to this hearing. [Testimony of mother] This was false. Only after the District's counsel showed the mother on cross-examination Ms. Bock's notes clearly confirming the mother's receipt of the letter did the mother change her previous testimony and admit that she received the letter. [Fact #13] Even then, her admission lacked credibility because she claimed that when she saw whom it was from, she burned it without reading it. Again, this testimony was contradicted by Ms.

Bock's notes, from which it was apparent that, even if the mother burned the letter, she read it first. [Fact #13] There was no reason to doubt the accuracy of Ms. Bock's notes, nor did anyone raise the possibility that the notes were not accurate. In that letter, which was Ms. Thombs's response to a letter from Ms. Bock written on the student's behalf, Ms. Thombs offered to meet to discuss special education for the student. [Fact #13, S-308]

As early as March of 2002, the mother was at a meeting with a special education teacher and special education director, where they discussed the role of special education and how an evaluation of the student for special services might be valuable. [Fact #9] This was one of many examples set forth in the facts above that made the mother's denials of any knowledge regarding special education simply not believable. [See Fact #13, 19, 26, 27, 30, 32, & 34] There was no reason to question the credibility of all these other witnesses and documents, and there was no explanation why the mother, who repeatedly attended meetings with special education directors and teachers who repeatedly offered to assess the student for special education, would, until May of 2005, think special education was only for the mentally retarded. Because so much of the mother's testimony was not credible, much of it was not included in the findings of fact above, and factual disputes were consequently resolved against her.

The rejection of the mother's testimony about her ignorance of special education does, however, establish as fact the District's knowledge that the student might have a disability requiring special education. Therefore, the question remains whether the District did what it was legally required to do with respect to its child find obligations upon the student's re-enrollment in District schools in January 2005.

The student began attending CBS on January 17, 2005. [Fact #33] As part of the student's transition to CBS, Jan Dodge conducted DRA and Key Math assessments. [Fact #33] Although she reported the results at a meeting on March 24, 2005, there was no evidence of when these

assessments were conducted. The District did not, however, make a referral to the PET at that point because at the January 18, 2005 meeting, the mother was not interested in special education services, and would not agree to have the District test the student. [Fact #32] Although the findings indicate that the participants at the January 18 meeting, including the mother, agreed to allow Ms. Dodge to conduct DRA and Key Math assessments [Fact #32], the mother testified at the hearing that these tests were done without her knowledge.<sup>9</sup> [Testimony of mother] In any event, it was crystal clear over the history of the relationship between the parties that the mother was adamantly opposed to the District evaluating her child for special education. Even before there were any other problems with the District, the student's xx grade teacher suggested to the mother that she meet with the school psychologist, who could test the student to determine any learning difficulties, but the mother could not allow it because she did not trust the District. [Fact #5] Her resistance to allowing the student to be evaluated continued even after the District decided to send her formal referral information, including her procedural safeguards. When Dr. Goodspeed mentioned the referral to special education, without any discussion about evaluations, the mother immediately responded that no one from the District was going to test the student. [Fact #35] She then proceeded to obtain her own evaluation, and refused to sign the consent to evaluate form for five months, despite Ms. Wyman's encouragement to allow the assessment, and Mr. Foster's explanation of her rights regarding evaluations. [Facts #35, 36, 38, & 43]<sup>10</sup>

The District asserts that because the mother refused special education and would not allow the student to be evaluated, it had no obligation to continue with the referral process. The IDEA

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<sup>9</sup> This statement is not credible and is not a factual finding.

<sup>10</sup> Although the mother alleged that she did not receive a consent to evaluate form in the June 2005 referral package, this as [sic] not credible. The referral letter was mailed on June 17, 2005. [Fact #35] Although the mother testified that she did not receive this until one week later, she told Ms. Wyman on June 20 that she was extremely upset with the District as she was informed that the special education department wanted to test the student. [Fact #35] Furthermore, there was no explanation as to why, if she did not receive the enclosures noted on the other correspondence, she did not ask the District about this when she called to complain about the District contacting the father. [Fact #35] The mother's many complaints during the hearing about not receiving District mailings were not credible, as discussed above.

gives parents the right to decline services and waive all benefits under the IDEA. See 20 U.S.C. § 1414(a)(1)(D)(ii)(II). *Fitzgerald ex rel. S.F. v. Camdenton R-III Sch. Dist.*, 45 IDELR 59 (8th Cir. 2006). See also *Rome School Comm. V. Mrs. B.*, 32 IDELR 61 (D. Me. 2000). When a parent waives her child's right to services, the school district may not override her wishes. *Id.* Additionally, a district is not required to force a parent to allow it to evaluate a child. The 2006 IDEA Part B regulations added language to 34 CFR 300.300(a)(3) and (c)(1) to clarify that a state or public agency does not violate the child find requirements of 34 CFR 300.111 and evaluation requirements in 34 CFR 300.301 through 300.311 if it declines to pursue an evaluation to which a parent has refused or failed to consent.<sup>11</sup>

The mother, however, argues that the law still requires that she be given the opportunity to participate in a PET meeting for the purpose of discussing a referral of the student, and that she be provided with timely notice of her procedural safeguards so that she could make an informed choice. Although Mr. Foster orally explained to the mother her rights to pursue special education services for the student at least twice, and tried to encourage her to consider it several times, the District did not provide the mother with written procedural safeguards until June 2005.

It is difficult to fault the District for its reluctance to force the mother into the special education identification process. From the very outset of the student's problems in school, the mother consistently and adamantly opposed allowing the District to evaluate the student, without even a reasonable discussion about what was involved. She simply would not hear of it, became angry, stormed out of meetings, or hung up the phone on District officials whenever there was any mention of evaluating the student for special education. [Fact #5, 9, 13, 19, 35] The District is correct that this is a case in which the family disliked the District for generations, and consequently,

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<sup>11</sup> The Maine proposed IDEA regulations follow 34 CFR 300.300(b)(4), stating that if a parent fails to respond to a request for consent, the school unit will not be considered in violation of the requirement to make available FAPE for the child, and is not required to convene an IEP meeting.

the mother distrusted the District and was unwilling to work cooperatively with the staff from the very beginning. She was not able to step back from her family's "baggage" about the District, and act rationally with respect to the student.<sup>12</sup> The District, wanting to get the student back in school, was wary of inflaming the situation. The District's mistake, however, was failing to provide the mother with written procedural safeguards.

The Federal regulations require school districts to provide parents with procedural safeguards upon an initial referral or parent request for evaluation. 34 CFR 300.504(a)(1). The District did not do this until it made a formal referral to special education in June 2005. While the District did not violate the federal regulations, it could not assume that the mother made an informed decision to refuse special education evaluations or services without first providing her with procedural safeguards. The Maine regulations make it clear that consent is intended to assure that the parent has been fully informed of all information relevant to the activity for which the consent is sought. MSER §12.4. Procedural safeguards are an important part of that information. I conclude that once the District sent the mother the procedural safeguards and made a formal referral to special education, but the mother still refused to cooperate and allow the District to evaluate the student, the District's obligation under the child find rules ceased. Child find is only a locating and screening process, but children must still undergo an initial evaluation to confirm eligibility.

The mother contends that the District had an obligation to give her the opportunity to participate in a PET meeting for the purpose of determining the need for evaluations. Section 8.1 states that the PET shall determine the need for evaluations and recommend such evaluations to the parent. MSER §8.1. The District counters that its one-step referral process described in Fact #35 above complies with this regulation and is allowed by Federal law. The District points out that the commentary on the Maine Special Education Regulations makes it clear that Maine did not intend

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<sup>12</sup> Dr. Perna felt it was very important for the mother to assist the student in developing a healthier opinion about school, but this was difficult for the student to do when the family could not do it.

to mandate an initial PET meeting to make decisions about evaluations. The commentary to which the District refers was the Department of Education's response to a question about whether the regulation "implies an actual PET meeting or a solicitation of PET member's opinions." *Basis Statement & Summary and Response to Comments* at 13 (September 30, 1999). The response said, in part, that the Federal regulations "indicate that the PET team responsible for this review of existing information and determination of needed evaluation data, 'may conduct its review without a meeting.'" The response further discussed the apparent preference of the Department of Education for convening a PET meeting "to ensure a full, free and frank discussion of the child's needs will improve parent school collaboration, will reduce disagreement and due process actions and is one way to meet this obligation. Other methods could include telephone conference calls, internet 'chatrooms,' etc." Therefore, convening a PET meeting is not required under the Maine regulations. Mr. Foster and other District staff, as well as Ms. Wyman, discussed with the Mother the types of testing needed to make a special education referral, thus providing her with the information she needed and an opportunity to express her views. [Fact #35, 36, 38] The District apparently took those views into account when the PET used only Dr. Nurick's psychoeducational evaluation, and did not seek further psychoeducational testing by its own evaluators.

**2. Due to the District's child find violation, it failed to provide the student with a free appropriate public education following his re-enrollment in public school, and through June 2005.**

Every student who is eligible for special education services is entitled under state and Federal law to receive a "free and appropriate public education ... designed to meet their unique needs and prepare them for employment and independent living." 20 USC 1400(d)(1)(A) (emphasis added). [sic] A Free Appropriate Public Education (FAPE) is defined in 20 U.S.C. § 1401(9) as: special education and related services that—

(A) have been provided at public expense, under public supervision, and without charge,



(B) meet the standards of the State educational agency,

(C) include an appropriate ... education in the State involved, and

(D) *are provided in conformity with the individualized education program* required under section 1414 (d) (emphasis added). The First Circuit elaborated that the student's educational program must guarantee "a reasonable probability of educational benefits with sufficient supportive services at public expense." See *G.D. v. Westmoreland School Dist.*, 930 F.2d 942, 948 (1st Cir. 1991). It is well established that a school is not obligated to offer an IEP that provides the "highest attainable level (of benefit) or even the level needed to maximize the child's benefit" in order to comply with the IDEA. *Id.* Furthermore, "parental preference alone cannot be the basis for compelling school districts to provide a certain educational plan for a handicapped child." *Brougham v. Town of Yarmouth*, 823 F. Supp. 9 (D. ME 1993). The educational benefit must be meaningful and real, and not trivial or de minimus, in nature.

The family has the burden of proof that the student's educational programming was inappropriate. See *Schaffer v. Weast*, 126 S. Ct. 528, 537 (2005).

Because the student was not referred for special education between January 17, 2005 and June 2005, he did not have an IEP. Although the District did its best to work with the mother to provide an appropriate education for the student, and he was certainly receiving individualized instruction in the form of tutoring, it cannot be considered a substitute for special education and related services. Therefore, the District did not provide the student with FAPE between his enrollment in CBS and the end of school in June 2005.

It was clear that once the District made the formal referral, it very much wanted to move forward and provide the student with an appropriate education, but the ball was in the mother's court, and she held onto it. The mother's insistence on her own evaluator, and her decision to withhold signing the consent form for five months after receiving it stopped the process in its tracks.

As the Maine Federal District Court recently confirmed, the District has a right to insist on conducting its own evaluations of a student under the IDEA. *C.G. and B.S. v. Five Town Community School District.*, 47 IDELR 132 (D. Me. 2007). The District tried its best to gain the mother's consent. As discussed above, the IDEA does not require a school district to force a parent to allow it to evaluate a child, and the school district has no obligation to develop an IEP for a student when the parent refuses to participate in the process. *Rome, supra*, 20 U.S.C. §1414(a). The Federal regulations are also clear that the time frame for initial evaluations does not apply when a parent refuses to allow a child to be evaluated. 34 CFR §300.301(d)(1). Therefore, I conclude the District was under no obligation to provide the student with FAPE during this period.

Once the mother returned the signed evaluation on November 6, 2005, the District swiftly completed the necessary evaluations and held a PET meeting, at which the student was identified as having a learning disability requiring special education. [Fact #43] The PET also drafted an IEP at that meeting. [Fact #44]

**3. The District provided the student with a free appropriate public education for the second half of the 2005-2006 school year and his extended school year program**

As an initial matter, the mother's testimony that she did not receive a copy of the IEP mailed to her on January 23, 2006 was not credible. As discussed above, the mother has not been straightforward about receiving other documents, particularly those mailed to her from the District. Although the mother testified about not receiving various documents the District mailed to her, there was no evidence of any mail receipt problems within the District, and none of the correspondence was ever returned to the District as undeliverable. [Testimony of B. Foster] The District's evidence of its procedure for mailing parents copies of special education documents was credible, and it is more likely than not that the mother received a copy of the IEP in January 2006.

Before discussing the appropriateness of the IEPs, it is important to note the differences in the family's perceptions of the student with those of his teachers, case manager, and various

medical personnel. The mother, grandmother and grandfather dearly love the student, are very committed to him, and want what they feel is best for him. Trying to meet his unique needs is undoubtedly difficult and stressful at times. Nonetheless, the mother and grandfather's accounts about the student are often exaggerated or misperceived, and the medical evidence does not always support their claims. For example, the family blames much of the student's difficulties on bus driver Richard Harvey's shaking the student's shoulder and yelling at him on March 7, 2002. Mr. Harvey's conduct, including his verbal abuse to the student, was very inappropriate, but it is not credible that this was the catalyst of the student's problems in school, and there was considerable medical evidence to the contrary. The student was having behavior problems before that time, which was why he was made to sit at the front of the bus in the first place, and also why he began seeing a therapist two months before the bus incident<sup>13</sup>. [Fact #6] Even in xx, his teacher noted problems with his behavior. [Facts #3, 4] Dr. Andy Cook did a psychiatric consult with the student in 2004, and attributed his difficult behaviors to his seizure disorder. [Fact #28] The mother, however, testified that Dr. Cook thought the student's behavior problems were due to posttraumatic stress caused by the school bus incident. [Testimony of Mother] Dr. Nurick felt the student's problems at school were in part the result of missing school so often, and advised the mother at least twice to return the student to school as soon as possible. [Facts #14, 19, 41] Another exaggeration or misperception was the family's allegation that the student was locked in a closet by District staff, when in fact there was no lock on the cabinet in question, and the student ran there to hide because he had misbehaved. [Fact #10] Another time, when the school notified the mother that the student had fallen off a piece of playground equipment, but was fine, the mother rushed him to the ER. The

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<sup>13</sup> During the student's psychological evaluation in May 2002, he did not mention Mr. Harvey or riding the school bus at all, even though he was asked questions like who was the meanest adult, or to describe his scariest episode. [Fact #14] When questioned by Deputy Cayer following the bus incident, the student said he was not afraid of Mr. Harvey, and that sometimes he was nice. [P-431] On the other hand, there is considerable evidence in the facts, including the mother's testimony, that the student was not a reliable source of information. [Fact #14, 55]

mother was angry with the ER staff and thought they did not know what they were talking about because they told her it was not a serious injury. [Fact #38] When discussing traumas the student had endured, the grandfather announced that the student had been sexually abused by another boy, despite medical evidence and the student's report to the contrary. [Facts #15, 49] These are a few examples of how the family's perceptions regarding the student differ from the perceptions of others who know him, and how their representations are not always credible.

The hearing officer must examine whether the student's educational program contained and implemented through his IEP was "reasonably calculated to enable the student to receive educational benefit." *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). In *Town of Burlington v. Department of Education*, the First Circuit explained that an appropriate education must be directed toward "the achievement of effective results – demonstrable improvement in the educational and personal skills identified as special needs – as a consequence of implementing the proposed IEP. 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984), *aff'd*, 471 U.S. 359 (1985).

The mother's objection to the student's IEP primarily had to do with the behavior plan because it did not reflect the discussion she alleged occurred at the PET meeting that, in view of the student's trauma history, the student had to be able to leave his classroom and go to the office when he became stressed and overwhelmed. Other than the mother's testimony, there was no evidence that this was discussed for inclusion in the student's behavior plan. There were other interventions in the student's behavior plan which were appropriate for dealing with the student's behaviors.

A major trigger for the mother's anger was when others had a different approach or philosophy for dealing with the student's behaviors than she did. Ms. Wyman summed up the situation well in her notes, in which she wrote that she felt that the mother and grandparents continued to make excuses for the student's behavior, rather than holding [sic] him accountable for his actions. [P-93] Although the student's therapist, Jean Fine, believed the student needed to find

ways to calm himself, other than leaving school, the mother's practice was to remove the student from situations in which he was forced to deal with his difficult behaviors. [Fact #20]

Ms. Wilber was a skilled, experienced professional who, like Ms. Wyman and Ms. Fine, simply had a different view from the mother about how to address the student's behavioral issues. Although school was going relatively well for the student in Ms. Wilber's program, the mother withdrew him after only one month because she disagreed with Ms. Wilber about not allowing the student to leave the classroom without permission whenever he wished. The mother was upset that an educational technician restrained the student after he charged Ms. Wilber. [Fact #46, 47] Even the student's counselor, Nancy Priest, who saw how upset the student was about being restrained, would not agree to write an opinion for the mother that the student could not attend school at CBS with Ms. Wilber as his teacher. In fact, Ms. Priest told Steve Brod that she was not opposed to the student working through it with Ms. Wilber. [Fact #48] Before really giving the student's program a chance, and without trying to work out her differences with the school, the mother chose to reject the student's entire educational program, thus depriving him of any education at all for three months. [Fact #47] This decision was counter to the advice of virtually everyone who worked with the student, including Dr. Nurick, Ms. Wyman, and Ms. Fine, all of whom strongly urged the mother to make the student's attendance at school a priority.<sup>14</sup> Here again, the mother rejected the views of the professionals.<sup>15</sup> There was no evidence, other than the mother's testimony, that the student's program failed to provide him with FAPE. The IEP was geared to meet the student's educational and behavioral needs, and was reasonably calculated to provide him with FAPE.

The District worked hard to arrive at a new behavior plan acceptable to the mother, and was

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<sup>14</sup>When Dr. Perna later evaluated the Student in May 2006, he, too, was concerned that the student was not attending school regularly. [Fact #52]

<sup>15</sup> This was one of several times that the mother caused the student to be absent from school for extensive periods of time because she became angry and disagreed with how the student's difficult behaviors were being handled. [Fact #11, 12, 47]

once again open to placing the student at a different school within the District. The District wanted very much to keep the student in school and offer him a supportive, nurturing educational experience. When the mother requested an OT evaluation, with her own choice of evaluator, the District agreed, and added OT services to the student's IEP. In early May 2006, the student was placed at AHS in Mr. McShane's special education class. [Fact #51] At Mr. McShane's request, the District transferred an educational technician to his program whom he thought would work well with the student. [Fact #53] Although there was not one scintilla of medical evidence that the student could not attend school for a full day, the mother felt that the student's medications caused him to be too tired, and restricted the student to attending a partial day of school. It was the mother's decision that deprived the student of key educational opportunities, including attending science class, which was one of his favorite subjects. Mr. McShane did not observe the student to be tired at school, but AHS was willing to provide the student with a place to rest, if needed. Without any medical evidence to support the mother's position, the hearing officer can only conclude that any lack of progress by the student was attributable to the mother's decision to limit him to a partial school day, not to his educational program. The District cannot be faulted for the mother's refusal to allow the student to access a full day of school.

The mother also argues that the student's ESY program was inadequate. The Maine regulations are clear that ESY services are appropriate when there is a probability that a student is at risk of losing skills previously mastered and is unable to recoup those skills within a reasonable period of time. MSER §5.9. There was no evidence, however, that the student would regress without ESY. The District's offer was purely to assist the student in catching up with his peers, due to missing so much educational time. [Fact #54] The District hired the mother's choice of tutor, and the student had a successful summer. Although Ms. Williams testified that this was largely because the family paid for 40 additional hours of tutoring, this was ESY, not compensatory education, and

the District was under no legal obligation to provide an additional 40 hours.

**4. The IEP developed for the 2006-2007 school year was reasonably calculated to provide FAPE to the student**

The student's current IEP was developed to address his many areas of need. As set forth in Fact #55, there are numerous detailed benchmarks for measuring the student's success. Kevin McShane testified credibly that things are going quite well for the student, and he is making some progress, although this is limited by the fact that his mother would not allow him to attend school for a full day. [Facts #59, 60] There was essentially no evidence opposing the specific provisions of the IEP, including the type or amount of services, goals and objectives, amount of mainstreaming or modifications. Given that the mother has the burden of proof and has failed to show that the IEP was not reasonably calculated to provide the student with educational benefit, or is otherwise not appropriate, I conclude that she has failed to meet that burden.

**5. The student is entitled to revision of the 2006-2007 IEP to include present level of performance statements based upon his most recent testing results, but not with respect to measurable goals and objectives, provision of private transportation services, and extended day or tutorial services**

There is very little guidance in the law or regulations about the statement of present levels of performance that must be included in an IEP. The recent decision of *Kirby v. Cabell Co. Board of Education*, 46 IDELR 156 (D. W.Va. 2006) is one of the few areas in which there is any direction about what the IEP must say to comply with this requirement. The Court held that an IEP does not comply with 20 USC §1414 if it fails to assess the child's present level of academic achievement and functional performance. These are the foundations on which the IEP must be built, and without clear identification of present levels, the IEP cannot set measurable goals and evaluate the child's progress. *Id.* While the statement in the student's IEP is quite detailed, it only mentions the student's functional performance, not his present level of academic achievement. The IEP should be amended to contain the student's present level of academic achievement, based upon recent testing.

Maine regulations also require measurable annual goals and benchmarks or short-term objectives. MSER §10.2B. Again, there is not much guidance about how specific these goals and benchmarks must be, but they are sufficiently clear to allow the student's teachers to assess whether he is making any real progress. These goals and benchmarks are adequate.

Given the exhaustive PET discussions through the winter, spring and summer of 2006 about the student's behavior plan, and the fact that he has one, there is what can only be considered a clerical error that the box indicating that the student has behaviors that impede his learning or the learning of others is not checked on his IEP. [Facts #51, 55, S-106, S-52] It is not necessary to return to a PET meeting to correct this error, but the behavior plan should be attached to the IEP. The adequacy of the behavior plan has already been discussed above.

Regarding the student's transportation, there is no evidence whatsoever to support the family's unreasonable demand that the District provide transportation supervised by someone other than the District's Director of Transportation. The student is currently not receiving transportation from the District because the mother has refused it. Ms. Paine made numerous attempts to work something out so that the family did not need to transport the student, most recently on January 31, 2007. Presumably, the District remains willing to consider reasonable transportation for the student. Thus, the lack of transportation in the IEP does not constitute a violation of FAPE, but a refusal of services by the mother.

The issue of extended day services has been addressed in #3 above.



## 6. Remedies for Child Find Violation

The usual remedy under the IDEA for a student who has been denied appropriate services in the past is an award of compensatory educational services to place him in the same position he would have occupied, had the District complied with the IDEA. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 24 (D.C. Cir. 2005). The First Circuit has reaffirmed that a student eligible under IDEA may be entitled to additional services in compensation for past deprivations. *MSAD No. 35 v. Mr. and Mrs. R.*, 321 F.3d 9 (1<sup>st</sup> Cir. 2003). Thus, the student is entitled to compensatory education for failing [sic] to refer the student for special education within 30 days of his enrollment on January 17, 2005 and June 17, 2005.

The First Circuit in *Pihl v. Mass Dep't of Educ.*, 9 F.3d 184, 188-189 & n. 8 (1<sup>st</sup> Cir. 1993) was clear that, “a student who fails to receive appropriate services during any time in which he is entitled to them may be awarded compensation in the form of additional services at a later time. [sic] *Pihl*, 9 F.3d at 198. Consequently, the hearing officer determines that, under the circumstances presented in this case, the student is entitled to compensatory education in the form of tutoring services. The student has done well with private tutoring, and this will assist him in making educational progress he was unable to make without special education services upon his return to District schools. The District shall provide the student with 130 hours of tutoring services. This represents two hours per day for 65 days during which the student did not receive educational services between February 17, 2005 and June 17, 2005, due to the District’s failure to refer the Student for special education following the 30-day assessment period allowed by the child find regulations.<sup>16</sup>

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<sup>16</sup>A compensatory education award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place, but need not compensate the student on an hour for hour basis. *Reid ex rel. Reid, supra*

**V. ORDER**

After consideration of the evidence presented during this due process hearing, the Hearing

Officer orders as follows:

1. The District violated its child find obligation between January 17, 2005 and June 17, 2005, thereby failing to provide the student with a free, appropriate public education during that period. The District shall therefore provide the student with 130 hours of tutoring services. The mother may elect to accept 40 hours of these services in the form of reimbursement for tutoring during the summer of 2006, at the rate of \$9.50 per hour paid to the tutor by the District.
2. The current IEP offered by the District is appropriate, but needs to be amended to include the student's current levels of performance, based upon the student's recent evaluations, and to add existing information regarding the student's behavior plan.
3. The District did not fail to provide the student with FAPE between June 15, 2005 and August 31, 2006.
4. The IEP developed for the 2006-2007 school year is reasonably calculated to provide FAPE to the student.

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SHARI B. BRODER. ESQ.  
Hearing Officer